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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 JANET S. KOBER,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Deputy
14 Commissioner of Social Security for
Operations,

15 Defendant.
16

CASE NO. 3:17-cv-5843 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

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18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local
19 Magistrate Judge Rule MJR 13 (*see also* Consent to Proceed before a United States Magistrate
20 Judge, Dkt. 2). This matter has been fully briefed. *See* Dkt. 9, 10.

21 After considering and reviewing the record, the Court concludes that the ALJ erred in
22 evaluating plaintiff's credibility because he did not give specific, clear and convincing reasons
23 for rejecting plaintiff's credibility. The ALJ's reasons for rejecting plaintiff's credibility relied
24 on his assessment that plaintiff's daily activities were in excess of her claimed limitations. This

1 was in error because the ALJ did not evaluate whether plaintiff's daily activities met the
2 threshold for transferrable work skills, nor specify how her past reports to others conflicted with
3 her testimony. This credibility determination was not harmless error because a more favorable
4 credibility determination may have added additional limitations to plaintiff's residual functional
5 capacity and resulted in a different disability determination.

6 Accordingly, this Court orders that this matter be remanded in accordance with sentence
7 four of 42 USC §405(g).

8 BACKGROUND

9 Plaintiff, JANET KOBER, was born in 1964 and was 48 years old on the alleged date of
10 disability onset of February 4, 2013. *See* AR. 171-74. Plaintiff graduated from high school and
11 has had some vocational training. AR. 42. Plaintiff has some work experience as a cashier but
12 was terminated due to attendance issues. AR. 43, 266-67.

13 According to the ALJ, plaintiff has at least the severe medically determinable
14 impairments of "degenerative disc disease of the lumbar spine; migraine headaches; obesity; and
15 chronic pain syndrome (20 CFR 404.1520(c))." AR. 23.

16 At the time of the hearing, plaintiff was living with her husband.
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18 PROCEDURAL HISTORY

19 Plaintiff's application for disability insurance benefits ("DIB") pursuant to 42 U.S.C. §
20 423 (Title II) of the Social Security Act were denied initially and following reconsideration. *See*
21 AR. 61-71, 74-85. Plaintiff's requested hearing was held before Administrative Law Judge Gary
22 Elliott ("the ALJ") on May 13, 2016. *See* AR. 37-60. On June 23, 2016, the ALJ issued a written
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1 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social
2 Security Act. *See* AR. 18-36.

3 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the
4 Commissioner err in determining plaintiff's severe impairments; (2) Did the Commissioner err in
5 determining plaintiff's RFC; (3) Did the Commissioner err in evaluating plaintiff's credibility;
6 and (4) Did the Commissioner err in evaluating the opinion evidence. *See* Dkt. 9, p. 2.

7 8 STANDARD OF REVIEW

9 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
10 social security benefits if the ALJ's findings are based on legal error or not supported by
11 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
12 Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

13 14 DISCUSSION

15 Because the Court finds that the third issue is dispositive, the Court will first address that
16 issue, before the others.

17 **I. Whether the Commissioner erred in evaluating plaintiff's credibility.**

18 Plaintiff alleges the ALJ erred in evaluating plaintiff's credibility. The ALJ's
19 determinations regarding a claimant's statements about limitations "must be supported by
20 specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (*citing Bunnell*
21 *v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*)). If an ALJ rejects the
22 testimony of a claimant once an underlying impairment has been established, the ALJ must
23 support the rejection "by offering specific, clear and convincing reasons for doing so." *Smolen v.*
24 *Chater*, 80 F.3d 1273, 1284 (*citing Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993)); *see also*

1 *Reddick, supra*, 157 F.3d at 722 (citing *Bunnell v. Sullivan, supra*, 947 F.2d at 343, 346-47). The
2 Court notes that this standard was reaffirmed by the Ninth Circuit:

3 Indeed, the cases following *Bunnell* read it as supplementing the “clear and
4 convincing” standard with the requirement that the reasons also must be
5 “specific.” (Internal citation to *Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th
6 Cir. 1995)). Our more recent cases have combined the two standards into the
7 now-familiar phrase that an ALJ must provide specific, clear, and convincing
8 reasons. (Internal citation to *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir.
9 2012)). There is no conflict in the caselaw, and we reject the government’s
10 argument that *Bunnell* excised the “clear and convincing” requirement. We
11 therefore review the ALJ’s discrediting of Claimant’s testimony for specific,
12 clear, and convincing reasons.

13 *Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014). As with all of the findings by the ALJ,
14 the specific, clear and convincing reasons also must be supported by substantial evidence in the
15 record as a whole. 42 U.S.C. § 405(g); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1
16 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

17 In his decision, the ALJ stated “there is evidence in the record that greatly undermines the
18 reliability of [plaintiff’s] testimony” and “[plaintiff] demonstrates a level of physical functioning
19 in her personal life in gross excess of her claimed physical limitations.” AR. 28. As examples, he
20 stated that plaintiff “tolerates the physical demands of watching her six-month-old grandchild
21 [and] enjoys walks, camping, and spending time with her family and friends. She has minimal
22 difficulties performing activities of daily living like cooking, light household chores, and
23 shopping.” *Id.*

24 In evaluating a claimant's allegations of limitations, the ALJ cannot rely on general
findings, but ““must specifically identify what testimony is credible and what evidence
undermines the claimant's complaints.”” *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006)
(quoting *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)); *Reddick*,

1 *supra*, 157 F.3d at 722 (citations omitted); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)
2 (citation omitted).

3 The Ninth Circuit specified “the two grounds for using daily activities to form the basis
4 of an adverse credibility determination: (1) whether or not they contradict the claimant’s other
5 testimony and (2) whether or not the activities of daily living meet “the threshold for transferable
6 work skills.” *Orn, supra*, 495 F.3d at 639 (citing *Fair, supra*, 885 F.2d at 603).

7 *A. Whether plaintiff’s statements contradict other testimony.*

8 Regarding her previous statements about her daily activities, there is only one mention in
9 the record that plaintiff “has been watching her six-month-old grandson daily.” AR. 613. There
10 is one mention of camping, which appears to be in the context of plaintiff’s general enjoyment of
11 the activity. AR. 341. The record does not specify how often nor to what degree plaintiff engages
12 in these activities. The examples of watching a grandchild and camping are vague and not
13 necessarily inconsistent with a disability finding. The ALJ did not inquire about these activities
14 during plaintiff’s hearing. A single mention of an activity without any development as to the
15 extent and intensity of that activity amounts to speculation and does not rise to the clear and
16 convincing evidence standard the Ninth Circuit requires. *Smolen, supra*, 80 F.3d at 1284
17 (citations omitted); *Sample v. Schweiker* 694 F.2d at 642 (citing *Beane v. Richardson*, 457 F.2d
18 758 (9th Cir. 1972); *Wade v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)); see SSR 86-8, 1986
19 SSR LEXIS 15 at *22.

20 According to the Ninth Circuit, “we may not take a general finding-an unspecified
21 conflict between Claimant’s testimony about daily activities and her reports to doctors-and comb
22 the administrative record to find specific conflicts.” *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th
23 Cir. 2014); see also *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015) (“Because the
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1 ALJ failed to identify the testimony she found not credible, she did not link that testimony to the
2 particular parts of the record supporting her non-credibility determination, [which] was legal
3 error”) (citing *Burrell*, 775 F.3d at 1139).

4 The ALJ also discounted plaintiff’s credibility because plaintiff “made inconsistent
5 statements regarding the severity of her anxiety symptoms.” AR. 28. His sole example was that
6 plaintiff stated that she “experienced anxiety attacks and had difficulties being around people
7 while working at Walmart... [but] during her consultative psychological examination, she did
8 not report any... difficulties being around people while working at Walmart.” *Id.* This is contrary
9 to the record. The consultative psychological exam contains a full paragraph of plaintiff’s alleged
10 anxiety which begins: “Janet reported worrying frequently. She reported experiencing panic
11 attacks in the past. She recalled having a “major attack” at work when a customer was
12 confrontational.” AR. 341. The ALJ states “this inconsistency suggests that the claimant’s
13 mental health symptoms are not as severe as alleged and weakens the weight that can be
14 accorded her reported symptoms.” AR. 28.

15 The ALJ’s assessment of plaintiff’s credibility in this regard is problematic because he
16 was plainly erroneous in his statement that plaintiff did not report anxiety symptoms to the
17 consultative psychological examiner. Moreover, the Administration recently clarified that
18 “subjective symptom evaluation is not an examination of an individual’s character.” SSR 16-3P,
19 2016 WL 111-9029, 2016 SSR LEXIS 4 at *1 (effective March 16, 2016). The ruling indicates
20 that when evaluating a claimant’s symptoms, ALJs “will not assess an individual’s overall
21 character or truthfulness in the manner typically used during an adversarial court litigation.” *Id.*
22 at 27. As noted in the Ruling, adjudicators “must limit their evaluation to the individual’s
23 statements about his or her symptoms and the evidence in the record that is relevant to the
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1 individual's impairments [as] [the] focus of the evaluation of an individual's symptoms
2 should not be to determine whether he or she is a truthful person." *Id.* As stated by the Ninth
3 Circuit, in reliance on the Supreme Court, "we defer to Social Security Rulings unless they are
4 plainly erroneous or inconsistent with the [Social Security] Act or regulations." *See Quang Van*
5 *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989) (citing *Chevron USA, Inc. v. NRDC, Inc.*,
6 467 U.S. 837, 842-45 (1984); *Paxton, supra*, 865 F.2d at 1356) (footnote omitted).

7 *B. Whether plaintiff's activities of daily living meet the threshold for transferrable work*
8 *skills.*

9 Regarding how plaintiff's alleged daily activities translate into transferable work skills,
10 the Ninth Circuit repeatedly has "asserted that the mere fact that a plaintiff has carried on certain
11 daily activities... does not in any way detract from her credibility as to her overall disability."
12 *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (*quoting Vertigan v. Halter*, 260 F.3d 1044,
13 1050 (9th Cir. 2001)). As stated by the Ninth Circuit, the ALJ "must make 'specific findings
14 relating to the daily activities' and their transferability to conclude that a claimant's daily
15 activities warrant an adverse determination regarding if a claimant's statements should be
16 credited. *Orn, supra*, 495 F.3d at 639 (*quoting Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
17 2005)). Here, the ALJ failed to evaluate whether plaintiff's daily activities met the "threshold for
18 transferrable work skills," which was legal error. *Orn, supra*, 495 F.3d at 639 (*citing Fair, supra*,
19 885 F.2d at 603).

20 *C. Whether the ALJ's credibility analysis is harmless error.*

21 The Ninth Circuit has "recognized that harmless error principles apply in the Social
22 Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (*citing Stout v.*
23 *Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting
24 cases)). The court noted that "several of our cases have held that an ALJ's error was harmless

1 where the ALJ provided one or more invalid reasons for disbelieving a claimant’s testimony, but
2 also provided valid reasons that were supported by the record.” *Id.* (citations omitted). Here, the
3 ALJ did not provide a valid reason for an adverse credibility determination because his reasons
4 were not supported by clear and convincing evidence in the record.

5 The Ninth Circuit states that “in each case we look at the record as a whole to determine
6 [if] the error alters the outcome of the case.” *Id.* The court also noted that the Ninth Circuit has
7 “adhered to the general principle that an ALJ’s error is harmless where it is ‘inconsequential to
8 the ultimate nondisability determination.’” *Id.* (quoting *Carmickle v. Comm’r Soc. Sec. Admin.*,
9 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted). The court noted the necessity to
10 follow the rule that courts must review cases “‘without regard to errors’ that do not affect the
11 parties’ ‘substantial rights.’” *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009)
12 (quoting 28 U.S.C. § 2111) (codification of the harmless error rule)).

13 Plaintiff based her disability claim on both mental and physical impairments. The ALJ
14 determined that the mental impairments of depression and anxiety were not severe, but plaintiff’s
15 chronic pain, lumbar spine impairment, migraine headaches, and obesity were severe
16 impairments. AR. 23. Plaintiff’s testimony as to the limiting effects of her pain and need for
17 frequent breaks, as well as her testimony that some days she is unable to perform any of her daily
18 activities due to her mental impairment, if given greater credibility, may have impacted the
19 limitations the ALJ included in his RFC and lead to a different disability determination. AR. 23,
20 44, 48-49.

21 At the hearing, the ALJ suggested an alternative hypothetical to the vocational expert
22 which included the additional limitation of being able to perform work-related tasks for only
23 eighty percent of the workday. AR. 59. The vocational expert opined that “that degree of
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1 reduction in performance or productivity would not be tolerated by most employers.” *Id.*
2 Plaintiff’s attorney also suggested the additional limitation of having only occasional interaction
3 with the general public. AR. 59. The vocational expert opined that this additional limitation
4 would rule out plaintiff’s past relevant work at step four of the sequential analysis. *Id.*; see 20
5 C.F.R. § 404.1520(f). Therefore, the ALJ’s adverse credibility determination is not harmless
6 error because including the limitation of having only occasional contact with the general public
7 could allow plaintiff to meet her burden of proof at step four, and including her need for frequent
8 breaks could have resulted in a favorable decision for plaintiff at step five. *See* 20 C.F.R. §
9 404.1520(f); 20 C.F.R. § 404.1560(c)(2). Therefore, the ALJ’s adverse credibility determination
10 is not “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d
11 1104, 1115 (9th Cir. 2012) (*citing Stout v. Commissioner, Social Security Administration*, 454
12 F.3d 1050, 1054 (9th Cir. 2006) (collecting cases)).

13 Therefore, the ALJ did not offer “specific, clear and convincing reasons” for rejecting
14 plaintiff’s credibility. *Smolen v. Chater*, 80 F.3d 1273, 1284 (*citing Dodrill v. Shalala*, 12 F.3d
15 915, 918 (9th Cir.1993)); *see also Reddick, supra*, 157 F.3d at 722 (*citing Bunnell v. Sullivan*,
16 *supra*, 947 F.2d at 343, 346-47). This Court concludes that remand is necessary for further
17 evaluation of plaintiff’s credibility.

18 **II. Whether the Commissioner erred in determining plaintiff’s severe impairments.**

19 Plaintiff alleges that the ALJ erred in failing to determine that plaintiff’s mental
20 impairments of depression and anxiety are severe impairments. A more favorable credibility
21 determination regarding plaintiff’s reported mental limitations may impact the ALJ’s
22 determination as to whether plaintiff’s impairments of depression and anxiety are severe.

23 Plaintiff also alleges that the ALJ failed to assess plaintiff’s medically determinable
24 impairments of cervicgia and fibromyalgia. Because this court finds the issue of credibility to

1 be dispositive, and because a different credibility determination may impact the ALJ's evaluation
2 of severe impairments, it would be moot to analyze whether it was harmless error to omit
3 cervicalgia and fibromyalgia from the ALJ's severity analysis. Thus, the severity of all plaintiff's
4 impairments should be assessed anew following remand of this matter.

5 **III. Whether the Commissioner erred in determining plaintiff's RFC.**

6 Plaintiff alleges the ALJ erred in determining plaintiff's residual functional capacity.
7 Because this Court concludes that a more favorable credibility determination may have led to a
8 different RFC determination, upon remand, the ALJ should give further consideration to
9 plaintiff's RFC.

10 **IV. Whether the Commissioner erred in evaluating the opinion evidence.**

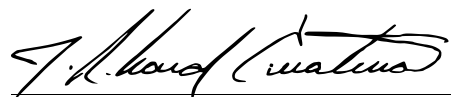
11 Plaintiff alleges the ALJ erred in evaluating opinion evidence, including the treating
12 physician's medical opinion. Further consideration of the above issues may impact the ALJ's
13 assessment of opinion evidence, which should be reassessed upon remand of this matter.

14 **CONCLUSION**

15 Based on these reasons and the relevant record, the Court **ORDERS** that this matter be
16 **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting
17 Commissioner for further consideration consistent with this order.

18 **JUDGMENT** should be for plaintiff and the case should be closed.

19 Dated this 6th day of July, 2018.

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21 J. Richard Creatura
22 United States Magistrate Judge
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